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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORGIIANL CIVIL JURISDICTION

CHAMBER SUMMONS NO.366 OF 2005
IN
EXECUTION APPLICATION NO.54 OF 2005
IN
SUIT NO.1762 OF 1994

Majithia & Mehta Constructions
Private Ltd. ... Plaintiff

V/s.

Dr.Natvarlal Dayashankar Joshi & Ors. ... Defendants

And

Hatane Premises Pvt. Ltd. ... Respondents

Mr.Virag Tulzapurkar with Ms.Alpana Ghone i/b Kanga & Co. for Plaintiff
Mr.Sanjay Kothari with Avinash Joshi i/b Mulla & Mulla for Defendant No.1
Mr.Rajesh Shah i/b B.Desai & Co. for Defendant No.5/Applicant

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: DECEMBER 21, 2005
JUDGMENT PRONOUNCED ON: **JANUARY 20, 2006**

JUDGMENT:

. The Chamber Summons has been taken out by Defendant No.5 in the Execution Application filed by the plaintiff. The facts leading to this Chamber Summons are as follows:

The Plaintiff had filed the present suit for specific performance of a Memorandum of Understanding arrived at between the plaintiff and Defendant No.1 as well as the supplemental agreement dated 8.2.1994 and development

agreement of the same date. It appears that initially defendant No.1 was impleaded as the sole defendant. Defendant Nos.2 to 5 were arrayed as defendants at the instance of the plaintiff. The consent terms between the plaintiff and all the defendants were executed on 30.6.1997. These consent terms have been signed by each of the defendants including defendant No.5. Under the consent terms, an area of 9811 sq.ft., consisting of the ground and four upper floors as well as the basement on the property was to be retained by the defendants as stipulated in clause 3(a) of the consent terms. Clause 31 of the consent terms provided for executing a perpetual lease in respect of the built up area of 9811 sq.ft. and basement etc. in favour of the defendants within 30 days from the date on which the defendants shifted to the new premises at the rear of the structure. Clause 39 of the consent terms indicates that the defendants undertook to shift to the area of 9811 sq.ft. allotted to them at the rear of the building within 90 days of the offer being made by the plaintiff. Vacant possession of the premises which were in the defendants' use at the time when the consent terms were signed were also to be handed over to the plaintiff who was expected to make payment of the balance of the purchase price simultaneously. Various other stipulations regarding delayed payment, etc. have been mentioned in clause 39. Under Clause 44, defendant

No.1 was to have a lien/charge over the suit property for the unpaid purchase price and which was to come up to an end on such payment being made. Defendant Nos.2 to 5 declared, by clause 45, that they did not have any claim, right, title and interest in respect of the suit property described in exhibit A to the plaint. They have also declared that they were making use of the existing structure as family members of Defendant No.1. Defendant Nos.2 to 5 agreed to hand over vacant and peaceful possession of the front portion of the existing structure to the plaint as also any other premises in their use and occupation in the suit property alongwith defendant No.1, on being offered possession of the rear of the building without claiming any right, title and interest in the existing structure.

2. Consent terms were later modified on 19.9.1997 and subsequently on 12.1.2001. The modification dated 19.9.1997 was in respect of clauses 5, 8(c), 9(a), 9(b), 13(c), 15, 20, 23, 27, 43 and 44. These consent terms dated 19.9.1997 were also signed by all the defendants and not defendant No.1 alone. The second modification of the consent terms led to the amendment of clause 39 wherein the defendants agreed to shift within 45 days and not 90 days as stipulated in the original consent terms. Clause 17 of the original consent terms was also modified.

3. Since the consent terms were not complied with by the defendants, the decree was put in execution by the plaintiff. Defendant No.1 has moved the present chamber summons claiming that the plaintiff and defendant No.1 had illegally entered into a lease deed on 19.9.2002. Defendant No.5 has sought cancellation of this lease deed executed by the plaintiff or the respondent (which is the new name of the plaintiff). A further direction is sought from this Court that the plaintiff should execute a fresh deed of lease in favour of each of the defendants in accordance with clause 31 of the consent decree dated 30.6.1997. In the alternative, it is prayed that the consent decree dated 30.6.1997 with its modifications on 19.9.1997 and 12.1.2001 be rescinded.

4. According to Defendant No.5, the consent terms were signed by each of the defendants including herself and her husband, defendant No.4. It is her case that she has a right to 1/5th of the undivided share in the leased property. Therefore, execution of the lease deed only in favour of Defendant No.1 was illegal. According to defendant No.5, she and her husband are in exclusive use and occupation of the entire third floor of the premises and the first floor on the rear side consisting of approximately 800 sq.ft. She contends that she is

occupying and in possession of the rest of the property, jointly with the other Defendants. Defendant No.5 also claims that the lease deed executed by the plaintiff in favour of defendant No.1 does not consider her right or that of her husband. She claims this right on the basis that the consent terms have been signed by each of the defendants. The modifications of 19.9.1997 and 12.1.2001 are also signed by each of the defendants. According to Defendant No.5, she is being deprived of her residential home and is being denied her rights in the demised property at the instance of her brother in law, defendant No.2 and her father-in-law, Defendant No.1. Defendant No.3 is the wife of Defendant No.2 and the sister-in-law of Defendant No.5.

5. The main contention of Mr.Shah, appearing for Defendant No.5, is that the consent terms when read as a whole indicate that each of the defendants had a right to be leased a portion of 9811 sq.ft. which was to be retained by the defendants under clause 3 of the agreement. Each of the defendants was also entitled to an undivided share of the basement area consisting of 1499 sq.ft. The learned Counsel submits that clause 31 indicates that the plaintiff would execute a lease deed in respect of the built-up area of 9811 sq.ft. and the basement alongwith the garden within 30 days after the defendants shifted to the new premises at the rear of

the structure. He submits that the plaintiff has illegally executed the lease deed only in favour of defendant No.1 when it was the intention of the parties signing the consent terms that the lease deed would be in favour of all the defendants including defendant No.5. Reliance is also placed by Mr.Shah on clause 39 indicating that the defendants would occupy the area consisting of 9811 sq.ft. allotted to them at the rear of the building within 90 days of the offer being made. Vacant possession of the premises in their occupation was to be given simultaneously on the balance of the purchase price being paid. He therefore, submits that the lease deed executed by the plaintiff in favour of Defendant No.1 should be cancelled. Reliance is placed on the judgment in the case of *Hungerford Investment Trust Ltd. (in voluntary liquidation) v/s. Haridas Mundhra & Ors.*, **AIR 1972 SC 1826.**

6. Mr.Kothari, appearing for Defendant No.1, submits that it is only defendant No.1 who had a right, title and interest in the suit property. Defendant Nos.2 to 5 were staying with him in the suit premises as members of his family and they had no independent right to the suit premises. He submits that the consent terms do not give any special right to Defendant No.5 or to any other defendants except defendant No.1 who was the owner of the suit property. According to him, clause 45

clearly indicates that the defendant Nos.2 to 5 have no right to claim any benefit from the suit premises. He then submits that Defendant Nos.4 and 5 are living in the suit premises only as gratuitous licencees and that a leave and licence agreement had been executed by defendant No.1 on the one hand and defendant Nos.4 and 5 on 14.6.2001. Under this leave and licence agreement, the entire third floor of the building which was constructed on the rear of the property was licenced to defendant Nos.4 and 5 on certain stipulations contained in the leave and licence agreement. The residential premises consisted of 1866 sq.ft. on the third floor of the building. This agreement was for a period of 11 months. He, therefore, submits that defendant No.5 has no independent right whatsoever and is in possession of the third floor only as a licencee.

7. Mr.Tulzapurkar, appearing for the plaintiff and the respondent, submits that the Chamber Summons is not maintainable as defendant NO.5 had no independent right in the premises. Defendant Nos.2 to 5 were added as party defendants in order to avoid any complications when the consent terms were signed since they were residing in the suit premises. According to him, defendant No.5 could not stake a claim for an independent right to the suit premises by way of a Chamber Summons. He submits that defendant No.5 would

have to adopt independent proceedings in order to establish her right to the leased property. The learned Counsel points out that clause 45 of the consent terms indicates that defendant Nos.2 to 5 were added as defendants only by way of convenience and they did not have any claim, right, title or interest in the demised property and therefore, the Chamber Summons itself was not maintainable.

8. To counter the submission of Defendant No.1 that defendant Nos.4 and 5 were gratuitous licencees, defendant No.5 has produced on record a declaration by defendant No.1 dated 14.6.2001 stating that defendant Nos.4 and 5 had entered into leave and licence agreement at his request and that defendant No.1 had assured defendant Nos.4 and 5 that the agreement would not be acted upon at any time in the future against them. It was also declared that the document would not deprive either defendant Nos.4 or 5 of the rights which they might have to the property. The signature on this letter has been denied by defendant No.1. Mr.Shah points out that on the date when the leave and licence agreement was executed by defendant NO.1, the consent terms were in force under which defendant No.1 was conveyed the right, title and interest in the suit property in favour of the plaintiff and defendant NO.1 only had a charge on the property for the unpaid

purchase price. The lease deed, under which defendant No.1 got a right to execute a leave and licence agreement, was executed on 19.9.2002 whereas the leave and licence agreement is dated 14.6.2001. Therefore, according to Mr.Shah, the reliance placed on the leave and licence agreement is of no avail to Defendant No.1, since he had no right to deal with the property till the lease deed was executed in 2002 in his favour.

9. After giving my anxious consideration to the facts involved, I am of the view that the Chamber Summons must be allowed. There is no dispute that Defendant No.5 had no independent right, title or the interest in the suit property. However, under the consent terms, it was agreed by the parties, for reasons best known to them, that each of the defendants would have an undivided share to the 9811 sq.ft. area. by way of a lease to be executed in their favour by the plaintiff. The plaintiff having made defendant Nos.2 to 5 parties to the litigation which it had filed against Defendant No.1 alone, agreed to execute a lease deed in favour of all the defendants. The word "defendants" i.e., in the plural rather than naming Defendant No.1 alone is used in the consent terms throughout, except for clauses 44 and 45. All the defendants are treated alike. Clause 44 indicates that Defendant No.1 would have a charge over the property for the unpaid purchase

prices. Defendant Nos.2 to 5 had no claim, right, title or interest in the suit property. Obviously, therefore, the parties had agreed that after the property was sold to the plaintiff, the plaintiff would lease to the defendants the ground and four upper floors consisting of 9811 sq.ft. to all the defendants. The defendants were also entitled to the basement which was on the rear of the building. Defendant No.5, therefore, had an undivided share to the leasehold rights of 9811 sq.ft. which was to be retained by the defendants. Significantly, clause 31 also mentions defendants in the plural. In these circumstances, it would be difficult to brush aside the submissions of Mr.Shah that Defendant No.5 would be entitled to an undivided share in the leased property and that therefore, the lease deed executed in favour of Defendant No.1 alone is null and void. The lease deed in favour of Defendant No.1 indicates that it has been executed pursuant to clause 31 of the consent decree.

10. The submission of Mr.Kothari that Defendant Nos.4 & 5 were mere gratuitous licencees of Defendant No.1 is unsustainable. Defendant No.1 had no right, title or interest in the property when he executed the leave and licence agreement on 14.6.2001, the lease deed being executed in his favour in 2002. In such circumstances, it is difficult to accept that Defendant

Nos.4 and 5 were residing merely as gratuitous licencees as claimed by Defendant No.1. Although this Court need not decide the issue as to whether Defendant Nos.4 and 5 were gratuitous licencees of Defendant No.1, there is no doubt that Defendant No.1 had no right to execute the leave and licence agreement in favour of Defendant Nos.4 and 5 on 14.6.2001. On that day, Defendant No.1 had merely a charge on the property for the unpaid purchase price and, therefore, he could not have created a licence in favour of Defendant Nos.4 and 5. The lease deed was executed in his favour much later. The leave and licence agreement could have been executed provided Defendant No.1 had a right to the property which he sought to licence to Defendant Nos.4 and 5. In my view, therefore, the Chamber Summons must be allowed and is accordingly allowed in terms of prayer clauses (a) and (b).

11. Mr.Kothari prays for stay of this order. Status quo as of today be maintained for a further period of four weeks from today.